85-1388

(1)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

KAONOHI OHANA, LTD.

Petitioner,

vs.

NANCY E. SUTHERLAND, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where all circuits in diversity cases except the Ninth Circuit Court of Appeals give special consideration to the decision of the district court's interpretation of the state law of its home jurisdiction when the state courts have not construed a controlling statutory provision, did the Ninth Circuit Court err when it refused to accord some deference on review to the lower court's interpretation of state law?

2. Where the Hawaii Revised Statutes and the Hawaii Rules of Appellate Procedure provide for certification by the Federal Appellate court of a question of Hawaii law which is determinative of the cause and upon which the Hawaii courts have not ruled, should the Court of Appeals for the Ninth Circuit accordingly have certified the question to the state court?

3. Where Section 416-33 of the Hawaii Revised Statutes is plain and unambiguous and the legislative history confirms that no exceptions were made for sales in the ordinary course of business, did the Court of Appeals err when it adopted this exception for Hawaii?*

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*The Plaintiff below in the Circuit Court of the Fifth Circuit of the State of Hawaii was Kaonohi Ohana, Ltd. and the Defendant in that action was Nancy E. Sutherland. The Plaintiffs below in Civil No. 84-0692 in the U.S. District Court for the District of Hawaii were Nancy E. Sutherland, and Donald Sutherland and Stephen Newnham, trustees of the Ralph L. Evans Trust, and the Defendant in that action was Kaonohi Ohana, Ltd. The state court action was removed to federal court becoming Civil No. 84-0748 and the two cases were consolidated by agreement.

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IN THE

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October Term, 1985

No. _____

KAONOHI OHANA, LTD.

Petitioner,

vs.

NANCY E. SUTHERLAND, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Kaonohi Ohana, Ltd. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals is

reported at 776 F.2d 1425 and is set forth in the Appendix hereto, pp. A-9 - A-20, infra. The unreported opinion of the District Court for the District of Hawaii is set forth in the Appendix hereto, pp. A-1 - A-8, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on November 22, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec.1254(1). Jurisdiction in the Court of Appeals rested on 28 U.S.C. Sec.1294(1). The District Court's jurisdiction was based upon diversity of citizenship, 28 U.S.C. Sec.1332.

STATUTES AND RULES INVOLVED

Section 416-33, Hawaii Revised Statutes

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[1] The statutes and rules are set forth in their entirety in the Appendix hereto pp. A-21 - A-28.

(hereinafter "H.R.S.") provides in relevant part:

A voluntary sale...of all or substantially all of the property and assets of any domestic corporation...may be authorized by it...when and as authorized or approved by the affirmative vote or consent of the holders of not less than three-fourths of all stock issued and outstanding and having voting power...

Section 602-5, HRS provides in relevant part:

The supreme court shall have jurisdiction and powers as follows: ...
To answer, in its discretion, any question of law reserved by a...federal appellate court if the supreme court shall so provide by rule...

Rule 13(a) of the Hawaii Rules of Appellate Procedure provides:

Rule 13. CERTIFICATION OF QUESTION OF HAWAII LAW BY FEDERAL APPELLATE COURTS.
(a) When Certified. When a federal appellate court certifies to the Hawaii Supreme Court that there is involved in and proceeding before it a question concerning the law of Hawaii which is determinative of the cause, and that there is no clear controlling precedent in the Hawaii judicial decisions, the Hawaii Supreme Court may answer the certified question by

written opinion.

STATEMENT OF THE CASE

A. Introduction

This case involves the purchase by the actor, Sylvester Stallone, of 5.36 acres of vacant fee simple beachfront property located at Kaonohi Point on the Island of Kauai, Hawaii.

Respondent Sutherland's $1.4 million offer to purchase that property was accepted by Petitioner Kaonohi Ohana, Ltd.'s Board of Directors contingent upon obtaining shareholders approval. Respondents' offer failed to receive the approval of any of Kaonohi OHana Ltd.'s stockholders, much less the 75% affirmative vote required by Sec.416-33, H.R.S. Thereafter, Petitioner Kaonohi Ohana, Ltd. received and accepted a $1.75 million offer from Sylvester Stallone which the Kaonohi Ohana, Ltd. shareholders unanimously approved.

Disgruntled over the rejection of her offer, Respondent thereupon demanded that the property be sold to her, contending that the approval of her offer by Kaonohi Ohana, Ltd.'s stockholders was not required.

B. Statement

Petitioner Kaonohi Ohana, Ltd. is an Hawaii corporation formed as a creditors' corporation pursuant to a plan of reorganization adopted in the reorganization in bankruptcy of Dr. Alex Ferreira. After its formation, in accordance with the "Modified Third Amended Plan of Reorganization" approved by the creditors and the court, Petitioner Kaonohi Ohana, Ltd. acquired as its only asset Dr. Ferreira's interest in the subject Kauai beachfront property. Pursuant to the Plan of Reorganization, attorney Boyce R. Brown formed the creditors' corporation whereby Dr. Ferreira's

creditors relinquished their claims against him and received in exchange stock in Kaonohi Ohana, Ltd. Because 11 U.S.C. Sec.1123(a)(6) prohibits the isssuance of non-voting stock in a creditors' corporation, the final amendment made to the Modified Third Amended Plan of Reorganization just prior to its approval was the insertion of the following provision:

> The charter of the corporation shall include a provision prohibiting the issuance of non-voting equity securities.

To facilitate the incorporation process, the initial stock of the corporation was taken in the name of Boyce Brown as trustee for the three classes of claimants in the Dr. Ferreira bankruptcy. All three classes of stock were given voting rights.

The original contemplation was for Kaonohi Ohana, Ltd. to subdivide the property into fifteen lots, sell them and distribute the net proceeds to the

creditor/shareholders. That procedure would have yielded about $1,850,000 according to the Fourth Amended Disclosure Statement (Supplemented) which accompanied the Modified Third Amended Plan of Reorganization. However, lacking cash to complete the subdivision and to develop and market the lots, and further faced with an August 31, 1984 deadline for paying off the land purchase contract, the best alternative appeared to be to sell the beachfront acreage "in bulk" as a single parcel along with the tentative subdivision approval Kaonohi Ohana, Ltd. had obtained from Kauai County. The sale of Kaonohi Ohana, Ltd.'s interest in the Kauai property was a sale of all of the assets of the corporation.

On February 26, 1984, Respondent made a highly contingent offer to buy the property for $1.2 million with $400,000 down and five year seller financing for the balance. That offer was presented to the Ferreira

creditors/Kaonohi Ohana, Ltd. shareholders-to-be who overwhelmingly rejected it.

Shortly after April 16, 1984, Kaonohi Ohana, Ltd. received a second, less contingent offer from Respondent to purchase the property for $1.4 million with $1 million down and the balance financed by the Seller for three years. Paragraph 4 of that offer read as follows:

> 4. Seller represents that it has obtained such approval as is required by its Articles of Incorporation and Bylaws and the statutes of the State of Hawaii to convey title to the subject property.

Kaonohi Ohana, Ltd. counteroffered by striking out the first six words of paragraph 4 and making a handwritten insertion intended to make the acceptance of the offer contingent upon receiving shareholder approval:

> 4. <u>This offer is contingent upon Seller obtaining</u> such approval as is required by its Articles of Incorporation and Bylaws and

> the statutes of the State of Hawaii to convey title to the subject property. (Emphasis added).

In a letter dated April 26, 1984, Respondent responded to the counteroffer expressly agreeing to the contingency of obtaining shareholder approval provided that such shareholder approval was obtained by May 31, 1984:

> 4. Changes are accepted IF A DEADLINE OF MAY 31, 1984 IS PROVIDED. (Emphasis in original).

The May 31, 1984 deadline subsequently was extended to June 29, 1984 to allow sufficient time to canvas all of Kaonohi Ohana, Ltd.'s shareholders.

In addition to the principal amount of the creditors' claims against Dr. Ferreira for which Kaonohi Ohana, Ltd. stock was issued, the Plan of Reorganization also specified that the shareholders were to receive as a "premium" an amount equal to 12% annual interest on their claims against Dr. Ferreira computed from January 18,

1982, the date Dr. Ferreira filed bankruptcy. As of mid-May 1984 the "premium" amounted to about $132,000 for Class A shareholders; $57,000 for the Class B shareholders; and, $54,000 for the Class C shareholders for a total of $243,000. That sum added to the $868,600 principal amount of the allowed claims totaled $1,111,600. The amount which was owed to Haena Point Associates, was about $500,000 in mid-May 1984. Thus in May of 1984 a sales price of about $1,600,000 net of real estate commissions was needed to pay off the land and also to pay all three classes of stockholders in full in accordance with the Plan of Reorganization. When combined with brokerage fees, past due taxes, unpaid engineering and subdivision fees and other costs, the Sutherland offer was more than $400,000 short of the amount required.

Respondent's offer failed to receive

approval of any of Kaonohi Ohana, Ltd.'s stockholders much less the 75% affirmative vote required by Sec.416-33, H.R.S. Thereafter the Board of Directors of Kaonohi Ohana, Ltd. received and accepted a $1.75 million offer from Sylvester Stallone, which offer was unanimouisly approved by the shareholders.

The courts of Hawaii had not construed Section 416-33, H.R.S. as applied to the present circumstances. The District Court determined that the sale of the property was subject to the shareholder approval requirement of Sec. 416-33, H.R.S. The appellate court reviewed the decision of the district court de novo giving "no special consideration whatever to the decision of [the] district court on the state law of its home jurisdiction." Matter of McLinn, 739 F.2d 1395, 1403 (9th Cir. 1984) (en banc).

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Judges' Refusal to Give Special Consideration to the Decision of the Federal District Court's Interpretation of State Law Where the Courts of the State of Hawaii Have Not Construed the Controlling Statutory Provision Is in Conflict With the Standard Which All Other Circuits Have Properly Applied to Questions of State Law.

Respondents' offer for the purchase of the 5.36 acres of beachfront property on Kauai was accepted contingent upon Kaonohi Ohana, Ltd.'s "obtaining such approval as is required by the statutes of the State of Hawaii." The statute referred to in the contingency was Section 416-33, H.R.S. which provides in pertinent part:

> A voluntary sale...of all or substantially all of the property and assets of any domestic corporation...may be authorized by it...when and as authorized or approved by the affirmative vote or consent of the holders of not less than three-fourths of all stock issued and outstanding and having voting power...

Two issues were before the appellate court: whether there is or should be a judicially created exception to Section 416-33, H.R.S.

for a sale of all of the assets of a corporation if that sale is in the regular course of business, and, if there is no judicially created exception and the approval of three-fourths of the stockholders was required, was such approval given in the case. Section 416-33, H.R.S. had never been interpreted by the courts of Hawaii. The U.S. District Court for the District of Hawaii, sitting in the jurisdiction found:

> Hawaii courts have not addressed the question whether a sale of property by a creditors' corporation set up for the purpose of selling that property is exempt from the shareholder approval requirement of section 416-33. In many jurisdictions with statutes similar to section 416-33, however, shareholder consent is not required when the sale is made in the normal course of business. See, e.g., Jeppi v. Brockman Holding Co., 206 P. 2d 847 (Cal. 1949). Assuming that Hawaii courts would follow the "normal course of business" exception, it is the determination of this court that the sale of the property in this case does not fall within that exception and therefore is subject to the shareholder approval requirement of the statute.

Decision and Order, Appendix hereto, pp. A-1 - A-8. The District court further found that on the undisputed facts as a matter of law no such approval was given. Id. at A-8. The Ninth Circuit Court, in its review of the district court's decision, stated:

> The district court's interpretation of Hawaii law is also reviewed de novo. In re McLinn, 739 F.2d 1395 (9th Cir. 1984) (en banc).

Appendix hereto, pp. A-13. Specifically, the Ninth Circuit Court declared:

> The courts of Hawaii have never considered the question of whether section 416-33 applies in such circumstances so we must use our best judgment to determine how Hawaii's highest court would interpret the statute. Anderson v. Bureau of Indian Affairs, 764 F.2d 1344, 1346 (9th Cir. 1985) (footnote omitted, emphasis added).[2] Id., A-14.

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[2]In Anderson the court noted its task to be "to use our best judgment to determine how Arizona's highest court would interpret [the relevant] statutes. 764 F.2d at 1346. In McLinn, supra, the Court announced its departure from the prevailing standard, and the court has followed (cont. on next pg.)

The Ninth Circuit had dramatically altered the standard weight it accorded a federal district court's decision providing notice in McLinn, supra, 739 F.2d 1395 that it was adopting a different rule as the law of the circuit. By so declaring, the appellate court departed from the prevailing practice in all circuits in diversity cases of according special weight or consideration to the district court's interpretation of state law issued by the judge who is sitting in the jurisdiction. In its departure, the Court specifically held:

> We hold that our appellate review of conclusions of state law should be under the same independent de novo standard as conclusions of federal law.

McLinn, supra, 739 F.2d at 1403.[3] In his vigorous dissent, Circuit Judge Schroeder,

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Footnote 2 (cont.) its divergent standard in subsequent cases. See, e.g. Anderson, supra.

[3] Prior to its dramatic departure from the standard applied by all (cont. on next pg.)

joined by dissenting Chief Judge Browning and Circuit Judges Anderson, Tang and Ferguson declared:

> I dissent from the majority's holding that henceforward the Ninth Circuit Court of Appeals will give no special consideration whatever to the decision of a district court on the state law of its home jurisdiction. The holding is not only a major departure from our own practice, but is contrary to all the reported decisions of the other circuits as well as the views of scholarly authorities on the question.
>
> The result can only serve as a disincentive to our district courts to explore and explain the authorities which bear on an issue of local law. It will tend to deprive the litigants of

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Footnote 3 (cont.) circuits, the Ninth Circuit Court had applied a deferential standard of review to the Federal district court judge's interpretation of the law of the state in which the judge sat. Joblonski By Pauls v. United States, 712 F.2d 391, 397 (9th Cir. 1983); Fleury v. Harper & Row, Publishers, Inc., 698 F.2d 1022, 1026 (9th Cir.), cert. denied, 464 U.S. 846 (1983); Airlift International, Inc. v. McDonnel Douglas Corp., 685 F.2d 267, 269 (9th Cir. 1982); Camacho v. Civil Service Commission, 666 F.2d 1257, 1262 (9th Cir. 1982); Gaines v. Haughton, 645 F.2d 761, 770 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982).

the benefit of that effort. It will encourage unsuccessful counsel to appeal on the assumption that reversals will become more frequent. Our own work will multiply. Sadly, the majority arrives at this result without an analysis of purpose, and in the face of overwhelming authority from the other circuits. We are not told why this novel view, rather than the standards applied by other circuit courts, is required to reach a just result in this or any other case.

. . .

In addressing state law issues on appeal, circuit courts have developed the practice of giving special consideration to a district court's decisions on state law questions arising under the law of the district court's home jurisdiction. Sound practical reasons underlie the development: the appellate courts can benefit greatly from a district judge's past experience and day to day familiarity with issues of state law within that judge's state. See 9 C. Wright & A. Miller, Federal Practice and Procedure sec. 2588, at 752 (1971) ("Wright & Miller").

While the precise articulation of the nature of the special consideration due district court decisions varies from circuit to circuit, and even from case to case within a circuit, the most common formulation is in terms of "great weight" or substantial deference."

. . .

The majority adopts the polar opposite view that the district court is entitled to no consideration. It makes the unique assertion that "we cannot have independent de novo review and

still defer to the decision of the district court: the concepts are inconsistent." The majority is misusing those terms as they are applied in this context. The majority's confusion is evident in its repeated mischaracterization of the standard which it today rejects. It says we have permitted reversal only for "clear error." As the following discussion demonstrates, that is not the standard which this court, or other circuit courts, have properly applied to questions of state law.

Appellate courts exercise de novo review over all questions of law, whether state or federal. Appellate courts may, and as the cases demonstrate overwhelmingly, do substitute their judgements for the judgements of district courts on state as well as federal issues. By giving "substantial deference," or what I believe to be the better phrase, "great weight," to the decisions of the district courts, appellate courts do not suspend their own thought processes. They treat the expertise of the district judge in local law as a factor that requires a careful review of the district court's decision before the appellate court reaches a different conclusion. The circuits have not, as the majority would have us believe, been guilty of a massive "abdication" of responsibility.

. . .

The special weight that should be given to a district court's decision is not intended to make our examination any less thorough or independent. It is intended to make us more careful. Its purpose is to prevent hasty and perhaps

arbitrary decisions in areas of local law with which we may not be fully familiar. Giving special consideration to a district court's decision on a state law question is a responsible exercise of appellate authority.

As dramatic support for his position, Circuit Judge Schroeder attached the following Appendix to his dissent:

APPENDIX [applicable standard emphasized]

C.A.Ark. 1981, Court of Appeals will give special weight to trial judge's interpretation of state law in diversity cases; nevertheless, Court of Appeals is not bound by district court's interpretation of state law and must reverse if it finds that district court has not correctly applied local law. - Red Lobster Inns of America, Inc. v. Lawyers Title Ins. Corp. 656 F.2d 381.

C.A.Ark. 1981. On questions of unsettled state law, Court of Appeals gives great weight to the district court's judgment. - Orlando v. Alamo, 646 F.2d 1288.

C.A.Ark. 1979. In diversity action, Federal Court of Appeals would apply law of state to issues before court and, in so doing, give great weight to district court's view of state law. - Foremost Ins. Co. v. Sheppard, 610 F.2d 551.

C.A.Ark. 1978. In diversity action, Court of Appeals will give great weight to interpretation of state law reached by trial judge who is familiar with

local law. - Luster v. Retail Credit Co., 575 F.2d 609.

C.A.Ark.1977. In a diversity case, interpretation of the district court on a question of state law is entitled to great deference. - Howard v. Green, 555 F.2d 178.

C.A.Colo. 1983. Views of the district court interpreting state law carry extraordinary force on appeal when there are no controlling state decisions providing clear precedent. - Campbell v. Joint Dist. 28-J, 704 F.2d 501.

C.A.Colo. 1983. Where action is one based on diversity, deference is to be accorded views of resident federal district judge with respect to interpretation and application of law of the state and appellate review is governed by the clearly erroneous standard. - King v. Horizon Corp., 701 F.2d 1313.

C.A.Colo. 1979. Views of federal district judge in diversity case, who is resident of state where controversy arose, interpretative of state's laws carry extraordinary force on appeal where there is no controlling state decisions providing clear precedent. - City of Aurora, Colorado v. Bechtel Corp., 599 F.2d 382.

C.A.Colo. 1979. Court of Appeals will give substantial weight to trial judge's perception of law of his resident state when law is unclear. - Glenn Justice Mortg. Co., Inc. v. First Nat. Bank of Fort Collins, 592 F.2d 567.

C.A.Colo. 1978. A federal appellate

court should recognize and give deference to views of federal trial judge as to state law in his resident state, and such views should be accepted, on appeal, unless they be demonstrably in error. - In re Winters, 586 F.2d 1363.

C.A.Colo. 1977. In the absence of controlling state decisions interpreting state statutes or precedents, the views of federal district court judge who is resident of state carry extraordinary weight on appeal regarding interpretation of statute. - Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807.

C.A.Fla. 1982. Interpretation of state law by federal district judge sitting in that state is entitled to deference. - Alabama Elec. Co-op., Inc. v. First Nat. Bank of Akron, Ohio, 684 F.2d 789.

C.A.Ga. 1979. A Georgia federal district judge's interpretation of George law was entitled to deference by Court of Appeals. - Kaufman and Broad Home Systems, Inc. v. International Broth. of Firemen and Oilers, AFL-CIO, 607 F.2d 1104, rehearing denied 612 F.2d 579.

C.A.Ill. 1983. Where no authoritative resolution of a legal issue had been rendered by state courts, district court's construction of state law on that issue is entitled to great weight on appellate review. - Lamb v. Briggs Mfg., a Div. of Celotex Corp., 700 F.2d 1092.

C.A.Iowa 1978. The views of able and experienced district judges with respect to questions of local law are entitled to great weight. - Green v. American Broadcasting Companies, Inc., 572 F.2d 628.

C.A.Iowa 1977. Great weight is accorded district court's determination of questions of state law. - Merchants Mut. Bonding Co. v. Appalachian Ins. Co., 556 F.2d 899.

C.A.La. 1982. Great defense should be accorded to a district judge's interpretation of the law of his or her state. - Trahan v. First Nat. Bank of Ruston, 690 F.2d 466.

C.A.La. 1982. In a diversity case, great deference is accorded the conclusions of state law reached by the district judge, schooled and skilled in the law of her state. - O'Toole v. New York Life Ins. Co., 671 F.2d 913, rehearing denied 677 F.2d 113.

C.A.La. 1982. In diversity cases which involve questions of local law, Court of Appeals will show deference to opinion of district court and give its views great weight, since federal judge who sits in particular state and has practiced before its courts is better able to resolve difficult questions about law of that state than other federal judges lacking such experience. - Commonwealth Life Ins. Co. v. Neal, 669 F.2d 300.

C.A.La. 1982. In diversity cases, when no state court decisions are available, opinion of federal judge

sitting in state whose law is to be applied is accorded special deference. - Robertshaw Controls Co. v. Pre-Engineered Products, Co., Inc., 669 F.2d 298.

C.A.Md. 1983. In determining state law in diversity cases where there is no clear precedent, Courts of Appeals are disposed to accord substantial deference to opinion of federal district judge because of his familiarity with state law which must be applied. - Caspary v. Louisiana Land and Exploration Co., 707 F.2d 785.

C.A.Minn. 1983. Court of Appeals gives great weight to conclusions of local district judge on questions of state law. - O'Brien v. Heggen, 705 F.2d 1001.

C.A.Minn. 1982. On questions of state law, Court of Appeals normally defers to judgment of district court sitting in the particular state involved. - In re Schwen's, Inc., 693 F.2d 48.

C.A.Minn. 1982. Court of Appeals gives great weight to conclusions of local district judge on questions of state law. - Bergstrom v. Sambo's Restaurants, Inc., 687 F.2d 1250.

C.A.Minn. 1982. Court of Appeals accords great weight to conclusions of local trial judge on questions of state law. - Sperry Corp. and its Sperry Univac Div. v. City of Minneapolis, 680 F.2d 1234.

C.A. Minn. 1979. District Court was

entitled to deference from Court of Appeals on questions of law of state wherein district court sat. - Schuster v. U.S. News & World Report, Inc., 602 F.2d 850.

C.A.Miss. 1982. In diversity cases, Court of Appeals will accord special deference to decision of a federal district judge on the application of the law of the state in which he sits especially when a statutory scheme is less than clear and capable of varying interpretation. - Golden v. Cox Furniture Mfg. Co., Inc., 683 F.2d 115, rehearing denied 685 F.2d 1385.

C.A.Miss. 1980. Federal district court judge's determination on law in his state is generally entitled to great weight on review. - Watson v. Callon Petroleum Co., 632 F.2d 646.

C.A.Miss. 1980. In the absence of controlling Mississippi precedent, the Court of Appeals, reviewing judgment rendered in Mississippi diversity suit, was required to decide whether an employer might be liable in damages for discharging an employee for pursuing his workmen's compensation rights as the court believed the Mississippi court would decide the issue and, in this regard, special weight was to be given to determination of district court judge who was familiar with local law. - Green v. Amerada-Hess Corp., 612 F.2d 212, rehearing denied 614 F.2d 1298, certiorari denied 101 S.Ct. 356, 449 U.S. 952, 66 L.Ed.2d 216.

C.A.Miss. 1978. When state decisional law affords no guidance,

interpretation of district judge, who was well versed in intricacies and trends of local law, is entitled to great deference. - Black v. Fidelity & Guaranty Ins. Underwriters, Inc. 582 F.2d 984.

C.A.Mo. 1983. The appellate court should give great deference to district court's determination of state law unless it is fundamentally deficient in analysis or otherwise lacking in reasoned authority. - Kansas City Power and Light Co. v. Burlington Northern R. Co., 707 F.2d 1002.

C.A.Mo. 1983. Interpretation of state law by district judge sitting in that forum is entitled to substantial deference in absence of controlling state precedent. - Nelson By Wharton v. Missouri Div. of Family Services, 706 F.2d 276.

C.A.Mo. 1983. Court of Appeals would defer to district court's interpretation of state law. - Glover v. Metropolitan Life Ins. Co., 698 F.2d 947.

C.A.Mo. 1983. Though district court's interpretation of the local law is entitled to great weight in diversity cases in which such law governs the issues, Court of Appeals in not bound by district court's interpretation of state law and must reverse if Court of Appeals finds that the district court has not correctly applied local law or if such interpretation of state law is fundamentally deficient in analysis or interpretation of state law is fundamentally deficient in analysis or otherwise lacking in reasoned authority.

- R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818.

C.A.Mo. 1982. Substantial deference is accorded district court's interpretation of local law in absence of controlling state precedent. - Renfroe v. Eli Lilly & Co., 686 F.2d 642.

C.A.Mo. 1980. Where issues in federal court are governed by state law, opinion of local federal district judge interpreting such law is entitled to great weight. - Hunter v. U.S. 624 F.2d 833.

C.A.Mo. 1980. Court of Appeals customarily defers to views of district court on questions of law of their forum states. - Jump v. Goldenhersh, 619 F.2d 11.

C.A.Mo. 1979. Federal court gives great weight to conclusion of local trial judge on questions of state law. - Lamb v. Amalgamated Labor Life Ins. Co., 602 F.2d 155.

C.A.Mo. 1978. Court of Appeals will give special weight to trial judge's interpretation of state law in diversity cases; nevertheless, court is not bound by district court's interpretation of state law and must reverse if it finds that district court has not correctly applied local law. - Bazzano v. Rockwell Intern. Corp., 579 F.2d 465.

C.A.Mo. 1978. In diversity case, Court of Appeals will accord great weight to conclusions of local judge on questions of local law. - Bergstreser v.

Mitchell, 577 F.2d 22.

C.A.Mo. 1976. Rodeway Inns of America, Inc. v. Frank, 541 F.2d 759, certioriari denied 97 S.Ct. 1580, 430 U.S. 945, 51 L.Ed.2d 792.

C.A.Neb. 1983. In diversity cases in which state law governs issues, district court's interpreation of that local law is entitled to great weight; however, Court of Appeals is not bound by district court's interpretation of state law and must reverse if it finds that district court has not correctly applied local law, or if such interpretation of state law is fundamentally deficient in analysis or otherwise lacking in reasoned authority. - Gillette Dairy, Inc. v. Mallard Mfg. Corp., 707 F.2d 351.

C.A.Neb. 1983. Court of Appeals is not bound by trial judge's interpretation of state law, but such interpretation is nonetheless given special weight in diversity cases. - Kizzier Chewrolet Co., Inc., of Scottsbluff, Neb. v. General Motors Corp., Oldsmobile Div., 705 F.2d 760.

C.A.Neb. 1981. Court will give deference to district court's findings on state laws where there is no strong argument that such choice of law is fundamentally deficient in analysis or otherwise lacking in reasoned authority. - Ancom, Inc. v. E.R. Squibb & Sons, Inc., 656 F.2d 650.

C.A.Neb. 1979. With respect to questions of substantive state law, opinion of experienced local judge is

entitled to great weight. - McPherson v. Sunset Speedway, Inc., 594 F.2d 711.

C.A.Neb. Although Court of Appeals is not bound by district court's interpretation of local law in a diversity case, "great weight" is to be accorded its determination. - Lincoln Carpet Mills, Inc. v. Singer Co., 549 F.2d 80.

C.A.N.M. 1980. Where New Mexico Supreme Court had not ruled on issues presented in motorcycle insurer's action seeking a declaration with respect to its liability for injuries sustained by passenger of insured motocycle, decision of Court of Appeals on substantive law issues presented would be predicated on its interpretation of how New Mexico Supreme Court would construe that law if faced with similar facts and issues; in that regard, resident district court's views on questions of New Mexico law would carry extraordinary force since there were no controlling state decisions providing clear precedent. - Farmers Alliance Mut. Ins. Co. v. Bakke, 619 F.2d 885.

C.A.N.M. 1978. Court of Appeals defers to resident district judge's view on an unsettled question of state law unless it appears clearly wrong. - Mendoza v. K-Mart, Inc., 587 F.2d 1052.

C.A.N.M. 1978. Federal Court will ordinarily accept view of resident district judge on unsettled law of his state unless it is clearly wrong. - Vallejos v. C.E. Glass Co., 583 F.2d 507.

C.A.N.D. 1979. In diversity suit for declaratory judgemnt, rights of parties were governed by law of state, and with respect to that, law opinions of experienced local district judge were entitled to great weight. 28 U.S.C.A. Sec, 2201. - American Motorists Ins. Co. v. Samson, 596 F.2d 804.

C.A.N.D. 1977. Views of a bankruptcy judge and a district judge on questions of purely local law are entitled to substantial weight. Bankr. Act, Sec. 6, 11 U.S.C.A. Sec. 24. - Grenz Super Valu v. Fix, 566 F.2d 614.

C.A.N.D. 1977. Court of Appeals usually gives deference to a district court's interpreation of state law. - Dakota Nat. Bank & Trust Co. v. First Nat. Bank & Trust Co. of Fargo, 554 F.2d 345, certioriari denied 98 S.Ct. 229, 434 U.S. 877, 54 L.Ed.2d 157.

C.A.N.D. 1977. Court of Appeals was bound to give great weight to district court's construction of applicable state law in diversity case. - Jamestown Farms Elevator, Inc. v. General Mills, Inc., 552 F.2d 1285.

C.A.Okl. 1980. Degree of deference should be given to resident federal district judge who was passing on question involving local state law. - Obieli v. Campbell Soup Co., 623 F.2d 668.

C.A.Okl. 1980. In a diversity case, views of federal district judge who is a resident of the state where the controversy arose, interpretive of state's laws, carry extraordinary force

on appeal where there are no controlling state decisions providing clear precedent. - Lyles v. American Hoist & Derrick Co., 614 F.2d 691.

C.A.Okla. 1979. Some deference is due federal district judge's determination of law of his resident state when law is unclear. - Travelers Ins. Co. v. Panama-Williams, Inc., 597 F.2d 702.

C.A.Okl. 1977. Great deference is to be accorded views of resident federal district judge relative to interpreation and application of law of his state in absence of controlling precedents opined by highest court of that state, however, where state's highest court has opined, question is then one of law and Court of Appeals review is governed by "clearly erroneous" rule and reversal of required only if appellate court's review results in firm conviction that mistake has been committed. Fed.Rules Civ. Proc. rule 52, 28 U.S.C.A. - Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 561 F.2d 202.

C.A.Okl. 1977. The trial court's finding that partnership was not the continuation of corporation involved a question of state law, and if there were no controlled state precedents, the resident federal district judge's interpretation and/or application of state law must be given extraordinary force on appeal. - R.J. Enstrom Corp. v. Interceptor Corp., 555 F.2d 277.

C.A.Okl. 1976. DeBoer Const., Inc. v. Reliance Ins. Co., 540 F.2d 486,

certiorari denied 97 S.Ct., 741, 429 U.S. 1041, 50 L.Ed.2d 753.

C.A.Okl. 1975. Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 516 F.2d 33, on remand 411 F.Supp. 705, reversed 561 F.2d 202.

C.A.Puerto Rico 1979. When court is faced with question involving proper construction of Puerto Rico law, court gives considerable deference to district judges who are citizens of Puerto Rico and well-versed in the Spanish underpinnings of Puerto Rico law. - Gual Morales v. Hernandez Vega, 604 F.2d 730.

C.A.Puerto Rico 1979. Much deference is accorded to district court's construction of law of locality in which it sits. - Garcia v. Friedsecke, 597 F.2d 282, certiorari denied 100 S.Ct. 292, 444 U.S. 940, 62 L.Wd.2d 306.

C.A. Puerto Rico 1978. Court of Appeals generally will not consider claims not raised before district court, and particularly where question involves proper construction of Puerto Rico law, deference to district judges who are Spanish speaking and trained in Spanish civil law is warranted. - Gual Morales v. Hernandez Vega, 579 F.2d 677, on remand Morales v. Vega 461 F.Supp. 656, affirmed 604 F.2d 730.

C.A.S.C. 1977. In the absence of definitive interpretation of statutes by state Supreme Court, Court of Appeals would defer to conclusion reached by district judge whose service as state and federal judge had made him familiar with the laws of the state. - U.S. V.

Burnsed, 566 F.2d 882, certiorari denied 98 S.Ct. 1270, 434 U.S. 1077, 55 L.Ed.2d 784.

C.A.S.D. 1983. District court's determination of state law is not binding on Court of Appeals. - Kotval v. Gridley, 698 F.2d 344.

C.A.S.D. 1980. In a diversity case, the Court of Appeals gives great weight to the district court's view of state law. - Greenwood Ranches Inc. v. Skie Const. Co., Inc., 629 F.2d 518.

C.A.Tenn. 1981. Federal Court of Appeals, in reviewing a district judge's interpretation of state law, is to give considerable weight to such interpretation. - Gabwell v. Canal Ins. Co., 663 F.2d 710.

C.A.Tenn. 1981. District judge's rulings on a matter of state law are entitled to respect by the Court of Appeals. - Transamerica Ins. Group v. Beem, 652 F.2d 663.

C.A.Tex. 1981. In reviewing a diversity action, Court of Appeals is reluctant to substitute its views of the state law for those of the district court judge. - Cole v. Elliott Equipment Co., 653 F.2d 1031.

C.A.Tex. 1980. Federal district court judge's determination on law in his state is entitled to great weight on review. - Avery v. Maremont Corp. 628 F.2d 441.

C.A.Utah 1982. Deference is to be accorded views of resident federal

district judge with respect to interpretation and application of law of his state absent controlling precedents held by highest court of that state. - Loveridge v. Dreagoux, 678 F.2d 870.

C.A.Wis. 1982. District court's construction of state law on issue state courts have not addressed is given great weight on appellate review. - Murphy v. White Hen Pantry Co., 691 F.2d 350.

C.A.Wyo. 1980. where there are no controlling state decisions providing clear precedent, the views of the resident district judge on matters of state law carry extraordinary force on appeal. - Amoco Production Co. v. Build Trust, 636 F.2d 361, certiorari denied 101 S.Ct. 3123, 452 U.S. 967, 69 L.Ed.2d 981.

C.A.Wyo. 1980. Absent clear error, Court of Appeals will defer to trial court's interpretation of state law of its district. - Smith v. Equitable Life Assur. Soc., 614 F.2d 720.

C.A.Wyo. 1978. Trial judge, having been a member of Wyoming bar and a practitioner, was presumed to be in superior position to predict from the evidence available whether Wyoming would follow majority or minority doctrine on subject involved in diversity action.-- Fox v. Ford Motor Co., 575 F.2d 774.

C.A.Wyo. 1978. An interpretation of a state's laws by a federal district judge who is a resident of state where controversy arose carries extraordinary force on appeal in a diversity case where there are no state decisions

> directly on point or none which provide a clear precedent. Fed. Rules Civ. Proc. rule 52(a), 28 U.S.C.A.--Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp., 571 F.2d 1144, certiorari denied 99 S. Ct. 183, 439 U.S. 862, 58 L.Ed.2d 171.

McLinn, supra, 739 F.2d at 1407-1412.[4]

The dramatic conflict between all other circuits and the Ninth Circuit Court is evident, and this breach has serious implications for the federal judicial system.

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[4] See, also, United States v. Durham Lumber Co., 363 U.S. 522, 527 (1960) where this Court deferred to the decision of the court below in a ruling on a question of state law "[s]ince [the court] is much closer to [state] law than we are..." Under the same rationale, the local district court is "much closer to [the law of the state of Hawaii] than [is the appellate court]." Id.

II. Section 602-5 (2) of the Hawaii Revised Statutes and Rule 13 of the Hawaii Rules of Appellate Procedure Provide For Certification to the Hawaii Supreme Court of a Question of State Law Which Is Determinative of the Cause and Upon Which the State Courts Have Not Yet Ruled.

The key question on appeal was whether Kaonohi Ohana, Ltd. was subject to the requirements of Section 416-33, H.R.S. in its sale of the assets of the corporation, the Kauai beachfront property. The Ninth Circuit clearly noted in its decision: "The courts of Hawaii have never considered the question of whether section 416-33 applies in such circumstances...." Sutherland, et al v. Kaonohi Ohana, Ltd., supra, 776 F.2d. at 1426. In such an instance, the Ninth circuit could have followed the appropriate procedure:

> If, however, the state has a procedure by which its highest court will answer questions of law certified to it by a federal court, the federal court may resort to this procedure to obtain an authoritative and binding statement on important but difficult and unclear issues of state law. (footnote omitted.)

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 4507. See, Sec. 602-5(2), H.R.S. and Rule 13 of the Hawaii Rules of Appellate Procedure, Appendix hereto, pp. A-21 - A-28.

In Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974), a shareholders' derivative, diversity action where there was uncertainty as to Florida State law, the Supreme Court noted:

> When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction.

Accordingly, the Supreme Court vacated the judgment and remanded the case to the Court of Appeals for that court to reconsider whether or not the controlling issue of State law should be certified to the Florida Court.

In the instant case, the appellate court

not only did not use the established Hawaii state court procedure to certify the question of state law to the Hawaii Supreme Court, but it also refused to accord weight to the "insider" federal district court judge sitting in the jurisdiction who was experienced with the local law. Lehman Brothers v. Schein, supra. The appellate court abruptly diverted from all other circuits by substituting its judgment for the district court without affording weight to the decision of the home jurisdiction. Declining to certify the state law question to the state court, the Ninth Circuit Court retained sole jurisdiction over the state law question and proceeded to "predict" how the state court would have interpreted the state statute.

Because only that Circuit declines to afford deference to the local federal district courts' decision, there is compelling reason for that circuit at least to

certify state law questions which are determinative of the cause to the state court in those jurisdictions which have adopted such procedure. See, Strange v. Krebs, 658 F.2d 268, 269 (5th Cir. 1981) (Diversity case where federal appellate court declined "to attempt precarious prediction of Mississippi law...when ready at hand is certification to the Supreme Court of Mississippi under its recent Rule 46."); Flannery v. United States, 649 F.2d 270, 271 (4th Cir. 1981) (Personal injury action under Tort Claim Act where because the Federal appellate court concluded "that the dispositive issues of this case present questions of West Virginia state law for which there appears no controlling precedent [the court] certif[ied] the questions...pursuant to that state's certification statute..."); Anderson v. Jackson Municipal Airport Authority, 645 F.2d 401

(5th Cir. 1981) (Diversity appeal where Federal appellate court certified to the State Supreme Court questions of law of Mississippi for which there were no clear controlling state precedents).[5] In the interest of building cooperative judicial federalism, the appellate court should have certified the determative question of state law to the Hawaii Supreme Court.

III. The Legislative History of Recent Amendments to Section 416-33, H.R.S. Which Took Effect July 1, 1986 Confirms That in 1984 No Exceptions Were Made for Sales in the Ordinary Course of Business, and Hawaii Courts Have Not Judicially Created an Exception.

Section 416-33, H.R.S. is plain and unambiguous and the district court properly interpreted it according to its plain specific terms. Section 416-33 of the Hawaii Revised Statutes provides in rele-

[5] The Mississippi Supreme Court Rule 46 is similar in purpose to that of Rule 13(a), Hawaii Rules of Appellate Procedure.

vant part as follows:

> A voluntary sale, lease or exchange of all or substantially all of the property and assets of any domestic corporation, including its good will, may be authorized by it upon such terms and conditions and for such consideration (which may be in whole or in part shares of stock in a domestic or foreign corporation) as its board of directors deem expedient, and for the best interests of the corporation, when and as authorized or approved by the affirmative vote or consent of the holders of not less than three-fourths of all stock issued and outstanding and having voting power. (emphasis added).

Section 416-33, H.R.S. is a plain and unambiguous statute which overlays and limits a corporation's right to contract to sell all of its assets without shareholder approval.

H.R.S. Sec. 416-33 contains no exceptions dispensing with shareholder approval for sales of all the assets of a corporation if made in the regular course of business. H.R.S. Sec. 416-33 which was in effect in 1984 and continued to be in effect until July 1, 1986 made no dis-

tinction between sales of all of a corporation's assets in the regular course of business and sales which were not made in the ordinary course of business. Unlike Hawaii, the statutes of many other jurisdictions specifically contain a provision which dispenses with the requirement of shareholder approval for sales of a company's assets if made in the regular course of business. Because the Hawaii statute makes no such distinction,without exception, the affirmative vote of three-fourths of all the shareholders of a Hawaii corporation is required for the voluntary transfer of all or substantially all of a Hawaii corporation's assets.

Act 167 passed by the Hawaii Legislature in 1983 amended Chapter 416 of the Hawaii Revised Statutes by enacting portions of the Model Business Corporation act. THOSE AMENDMENTS DID NOT BECOME LAW UNTIL JULY 1, 1986 two years following the shareholders'

approval of Sylvester Stallone's offer. After their effective date these amendments explicity recognized a difference between a sale of all or substantially all of a corporation's assets made in the regular course of business and sales which are outside the regular course of business. Subsequent to July 1, 1986, sales made in the usual and regular course of business no longer required the authorization of 3/4 of the shareholders. However, since these amendments did take effect until July 1, 1986 they have absolutely no bearing on the present case. Indeed, the enactment of the amendments to the Chapter 416, H.R.S. is a clear indication under the law existing prior to the amendment that approval by 3/4 of the shareholders was required whether or not the sale of all of a coporation's assets was in the regular course of business. The legislative history of Act

167 is very clear on this point. The Legislature recognized that the current law makes no distinction between sales in the ordinary course of business and those outside the oridinary course of business. It was precisely because no such distinction is made in the present law that the legislature enacted "the regular course of business" exception to the otherwise mandatory requirement of consent by 3/4 of the stockholders.

In a long explanation of the changes being made to Chapter 416, the legislators compared the new amendments and statutes with those of the Model Corporation Business Act and grouped the changes according to whether they were (1) new Hawaii law, (2) similar provisions in the model act which parralleled existing Hawaii law, or (3) were changes to existing Hawaii law. Not surprisingly, the discussion pointed out that Section 78 of the Model

Act, which served as the model for the amendment to HRS 416-33 was recognized as being a change to existing Hawaii law. See Appendix hereto, pp. A-29 - A-34. It was noted that the Model Act differentiated between a sale or disposition of assets in the regular course of business, whereas former Hawaii statutes made no such distinction. The legialative history noted that the change was to take effect in 1986 and was "in contrast to the present three-fourths requirement." House Conf. Comm. No. 12, 12th Legislature of Hawaii, Regular Session, 1983.

Furthermore, Hawaii's Courts had not judicially created an exception to Sec. 416-33, H.R.S. for sales in the regular course of business. At common law the sale of all or substantially all of a corporation's assets required the unanimous approval of a corporation's shareholders.

MDG Supply Inc. v. Calmes, 52 Haw. 154, 155, 472 P.2d 499, 500 (1970). To mitigate the effect of that common law rule many states passed statutes requiring less than unanimous concurrence. Hawaii was no such state. Id.

In Hawaii, statutes in derogation of the common law are strictly construed. Maguire v. Tong Wo, 5 Haw. 41, 43 (1883); Lucas v. Redward, 9 Haw. 23, 25 (1895); Lewers & Cooke, Ltd. v. Wong, 22 Haw. 765, 767 (1915); Rathburn v. Kaio, 23 Haw. 541, 545 (1916); Akai v. Lewis, 37 Haw. 374, 379 (1946); Gabriel v. Margah, 37 Haw. 571, 580 (1947); State v. Taylor, 49 Haw. 624, 628, 425 P.2d 1014, 1018 (1967).

There are only two Hawaii cases interpreting Sec. 416-33, H.R.S. Inferentially both support Kaonohi Ohana, Ltd.'s position. In Hawaiian Trust Co. v. United States, 178 F.Supp. 637 (D. Hawaii 1959), rev'd on other grounds, 291 F.2d

761, the Court expressly stated "Hawaiian law requires that the sale of substantially all of the property receive the affirmative vote of 3/4 of all stock issued outstanding and having voting power." Id. at 640. The Hawaii Supreme Court also construed the statute in MDG Supply, Inc. v. Calmes, 52 Haw. 154, 472 P.2d 499 (1970). The Court indicated that the purpose of the statute was to change the consent requirement from unanimous consent to 3/4 of the stockholders. The Court stated:

> HRS, Section 416-33 allows a corporation to make a voluntary transfer of all or substantially all of the corporate assets by an affirmative vote of 3/4 of the shareholders, rather than the unanimous consent as required by common law.

52 Haw at 154-155, 472 P.2d at 500.

Hawaii courts have never carved out an exception to the requirements of Sec. 416-33, H.R.S. for sales made in the regular course of business. Rather, they have

expressly reiterated that a sale or transfer of all or substantially all of the corporate assets requires an affirmative vote of 3/4 of the stockholders. The amendments to Sec. 416-33, H.R.S. were made expressly to change existing law to provide the distinction Respondents urge. However, as noted earlier those statutes did not take effect until 1986.

In this case, whether or not the sale of the Kaonohi Point property was or was not in the regular course of business is irrelevant. The clear and unambiguous language of the present statute requires the consent of three-fourths of the stockholders as a condition of sale of a corporation's assets whenever the sale is for all or substantially all of the corporate property. The District Court correctly recognized that any assertion to the contrary by Respondents is simply wrong.

CONCLUSION

The Ninth Circuit has departed from the standard applied by all other circuits in its review of the local Federal district court's interpretation of the law of the state. The appellate court further ignored the state procedure for certifying questions of state law to the Hawaii Supreme Court which are determinative of the cause and which have not been interpreted by the state courts.

The questions presented by this Petition are substantial, important and recurring, and definitive ruling by this Court would resolve conflict between the Ninth and all other circuits. For these reasons, this Court should issue a writ of certiorari and reverse the Ninth Circuit Court's decision.

Respectfully submitted,

Boyce R. Brown, Jr.
Counsel of Record

Cynthia H.H. Thielen
Attorney for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

NANCY E. SUTHERLAND, et al., Plaintiffs, vs. KAONOHI OHANA, LTD., Defendant.	)	Civil No. 84-692 FILED IN THE UNITED STATES DISTRICT COURT DISTRICT OF HAWAII Aug. 27, 1984
KAONOHI OHANA, LTD., Plaintiff vs. NANCY E. SUTHERLAND, Defendant.	)	Civil No. 84-748

DECISION AND ORDER

I

These consolidated cases arise from a dispute concerning the sale and purchase of a parcel of beachfront property located on the island of Kauai. The seller, Kaonohi Ohana, Ltd., is a Hawaii corporation that was formed pursuant to a reorganization plan approved in bankruptcy proceedings in

the Northern District of California. The debtor in those proceedings, Dr. Alex Ferreira, previously agreed to purchase the property in question from Haena Point Associates. The reorganization plan called for the formation of a corporation in Hawaii to which Ferreira would assign his interest in the agreement of sale entered into with Haena Point Associates. Kaonohi Ohana, Ltd. has no other assets aside from the property in question. It has three classes of stock: Class A, general unsecured creditors; Class B, creditors who invested in an earlier, unsuccessful attempt to develop the property; and Class C, Dr. Ferreira himself. At all relevant times, all classes of stock were held by Boyce Brown, Esq. as trustee for the claimants.

In April 1984, Kaonohi Ohana, Ltd. received an offer to purchase the property

for $1.4 million from Nancy Sutherland. Kaonohi Ohana was represented in its negotiations by Boyce Brown, who is also a director and vice-president of the corporation. After further negotiations, Brown accepted Sutherland's offer on behalf of the board of directors. The parties agreed that shareholder approval of the sale, if required, would have to be obtained by June 29, 1984, the closing date.

Several weeks before the closing date, Kaonohi Ohana received an offer from Sylvester Stallone to purchase the property for $1.75 million. Kaonohi Ohana accepted that offer subject to the rights, if any, of Sutherland. Shortly thereafter, Kaonohi Ohana filed an action for declaratory judgment in Hawaii state court seeking a determination as to the applicability of Hawaii Rev. Stat. Sec. 416-33, which

requires shareholder approval of certain sales of a corporation's assets. Sutherland removed the action to this court and filed a separate action for specific performance and damages. Sutherland has moved for summary judgment in the action for specific performance and damages; Kaonohi Ohana has moved to dismiss that action. Both parties have moved for summary judgment in the declaratory judgment action.

II

Both parties contend that no genuine issues of material fact exist and that the dispositve legal issue is the applicability of Hawaii Rev. Stat. Sec. 416-33, which provides:

> A voluntary sale, lease, or exchange of all or substantially all of the property and assets of any domestic corporation, including its good will, may be authorized by it upon such terms and

> conditions and for such consideration... as its board of directors deems expedient, and for the best interests of the corporation, when and as authorized or approved by the affirmative vote or consent of the holders of not less than three-fourths of all stock issued and outstanding and having voting power....

Kaonohi Ohana contends that the shareholder approval requirement of section 416-33 applies to the sale of the property in this case and that such approval was not obtained for the sale to Sutherland. Sutherland argues that the shareholder approval requirement does not apply to this particular sale; alternatively, Sutherland contends that shareholder approval was effected when Boyce Brown signed the acceptance.

Hawaii courts have not addressed the

question whether a sale of property by a creditors' corporation set up for the» purpose of selling that property is exempt from the shareholder approval requirement of section 416-33. In many jurisdictions with statutes similar to section 416-33, however, shareholder consent is not required when the sale is made in the normal course of business. See, e.g., Jeppi v. Brockman Holding Co., 206 P.2d 847 (Cal. 1949). Assuming that Hawaii courts would follow the "normal course of business" exception, it is the determination of this court that the sale of the property in this case does not fall within that exception and therefore is subject to the shareholder approval requirement of the statute.

None of the cases cited by Sutherland in support of her argument that section 416-33 is inapplicable involved the type of stiuation presented here. Kaonohi Ohana

was formed for the purpose of selling the property in order to pay off Ferreira's creditors and, apparently, Ferreira himsel. Clearly all the claimants have an important stake in the sale of the property, the corporation's only asset, since the satisfaction of their claims depends on the terms of the sale. Accordingly, it would seem imperative that their consent be obtained.

III

Sutherland argues that Brown's acceptance of her offer on behalf of the board of directors constituted shareholder approval as well, since Brown held all shares as trustee. This argument must be rejected.

Brown was acting in two distinct capacities. He accepted the offer on behalf of the board of directors, as noted below, his signature. The record indicates

that subsequently, in his capacity as trustee, he proceeded to solicit approval of the deal from the beneficiaries but was unsuccessful. Consequently, in his capacity as sole shareholder, he never approved the sale of the property to Sutherland.

Therefore, IT IS HEREBY ORDERED that Sutherland's motions for summary judgment in Civil No. 84-692 and Civil No. 84-748, respectively, are DENIED.

IT IS FURTHER ORDERED that Kaonohi Ohana's motion to dismiss in Civil No. 84-692 and motion for summary Judgment in Civil No. 84-748 are GRANTED.

DATED: Honolulu, Hawaii, August 24, 1984.

/s/ Samuel P. King
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NANCY E. SUTHERLAND, and DONALD SUTHERLAND and STEPHEN NEWHAM, Trustees of the Ralph L. Evans Trust Plaintiffs/ Appellants, vs. KAONOHI OHANA, LTD., Defendant/ Appellee.	)	No. 84-2618 D.C. Nos. CV-84-0692 CV-84-0748 OPINION
KAONOHI OHANA, LTD., Plaintiff/ Appellee, vs. NANCY E. SUTHERLAND, Defendant/ Appellant.	)	

Argued and Submitted
August 16, 1985 - San Francisco, California

Filed November 22, 1985

Before: William A. Norris and Stephen Reinhardt, Circuit Judges and Earl B. Gilliam*, District Judge.

Per Curiam

Appeal from the United States District Court for the District of Hawaii
Samuel P. King, District Judge, Presiding

COUNSEL

Alexander C. Marrack, Honolulu, Hawaii, for the plaintiffs-appellants.

Brown & Johnston and Boyce R. Brown, Jr., Honolulu, Hawaii, for the defendant-appellee.

OPINION

PER CURIAM:

I. BACKGROUND

Appellee Kaonohi Ohana, Ltd. is a Hawaii corporation that was formed pursuant to a reorganization plan in a Chapter 11 bankruptcy proceeding in which a Dr. Alex Ferreira was the debtor. Pursuant to the

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*Hon. Earl B. Gilliam United States District Judge for the Southern District of California, sitting by desigation.

plan, Ferreira assigned title to a 5.5 acre parcel of land on the island of Kauai, Hawaii to appellee corporation. Ferreira's creditors were to assign their claims to appellee in return for shares of its stock. When appellee sold the land, its only asset, it was to be liquidated and the proceeds distributed to the shareholders.

On May 4, 1984, Boyce R. Brown, vice-president of appellee, acting for appellee corporation's board of directors, agreed to sell the parcel of land to appellants for $1.4 million. On June 6, appellee received an offer from a third party to purchase the property for $1.75 million. On June 12, Brown informed appellants that at the request of Ferreira's creditors he had accepted the new offer on behalf of appellee's board of directors.

Appellants, viewing Brown's actions as an anticipatory repudiation, promptly filed

suit for specific performance and damages in federal district court. On th same day, appellee filed suit in Hawaii state court, seeking a declaration that section 416-33 of the Hawaii Revised Statutes had not been complied with in the case of appellants' offer and therefore appellants did not have a binding contract with appellee. The state court action was removed to federal district court, where both parties moved for summary judgment. Appellants also moved for summary judgment in the action for specific performed and damages, while appellee moved to dismiss. Appellee's motion for summary judgment and its motion to dismiss were granted, and an appeal was taken.

A grant of summary judgment is reviewed de novo, Lojek v. Thomas, 716 F.2d 675, 677 (9th Cir. 1983), as is the grant of a motion to dismiss. North Star International v. Arizona Corporation Commission, 720 F.2d

578, 580 (9th Cir. 1983). The district court's interpretation of Hawaii law is also reviewed de novo. In re McLinn 739 F.2d 1395 (9th Cir. 1984) (en banc).

The only questions before us on appeal are whether the proposed sale to appellants was subject to the requirements of section 416-33 of the Hawaii Revised Statutes, and if so, did appellee's actions constitute compliance.

II. ANALYSIS

Section 416-33 provides in part that:

> A voluntary sale... of all or substantially all of the property and assets of any domestic corporation... may be authorized by it... when and as authorized or approved by the affirmative vote or consent of the holders of not less than three-fourths of all stock issued and outstanding and having voting power.

Appellants argue that because appellee corporation was organized for the sole purpose of selling the parcel of land (either before or after development),

appellants' proposed acquisition was not subject to section 416-33. The courts of Hawaii have never considered the question of whether section 416-33 applies in such circumstances[1], so we must use our best judgment to determine how Hawaii's highest court would interpret the statute. Andersen v. Bureau of Indian Affairs, 764 F.2d 1344, 1346 (9th Cir. 1985).

Statutes such as section 416-33 have been enacted in most, if not all, states, and the purpose is generally held to be to ensure that the shareholders approve of any sale of assets which would prevent the corporation from accomplishing the purposes or objection for which it was incorporated.

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[1] Section 416-33 has been construed by the courts in apparently only two cases. See MDG Supply, Inc. v. Calmes, 52 Hawaii 154, 472 P.2d 499 (1970) per curiam): Hawaiian Trust Co. v. United States. 178 F.Supp. 637 (D.Hawaii 1959). rev'd on other grounds. 291 F.2d 761 (9th Cir. 1961). Neither case addresses the issue now before us.

Annot., 9 A.L.R.2d 1306, 1309-10 (1950); 19 Am.Jur.2d Corporations Sec. 1531 (1965). When a sale would not prevent a corporation from accomplishing its purpose or objectives, courts have implied an exception and held that the shareholder consent statute does not apply, despite what would seem to be the unconditional language of the statutory provisions. A.L.R.2d at 1310; 19 Am.Jur.2d, supra. Sec. 1531. In deciding whether an exception to the statute is applicable, the inquiry is often framed in terms of whether, in light of the corporation's purposes and objectives, the sale at issue is in the corporation's ordinary course of business. See, e.g., Eisen v. Post, 3 N.Y.2d 253, 146 N.E.2d 779, 169 N.Y.S.2d 15 (1957); 19

Am.Jur.2d, supra Sec 1531.[2]

Not only the purpose underlying shareholder consent statutes, but also their history supports the creation of an "ordinary course of business" exception to the statutory language. The statutes, including Hawaii's,[3] were enacted for the purpose of abrogating the common-law rule which required unanimous consent of the shareholders. However, the common-law rule itself had an exception for sales in the ordinary course of the corpoation's business, and the courts have continued to apply that exception to the statutory provisions on the theory that the statutes were intended to abrogate only the unanimity rule, not the exception. See

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[2] In the ordinary course of the corporation's business is a term of art when used in the context of shareholder consent statutes.

[3] See 1937 Hawaii House of Representatives Journal (Regular Session) 1073-74.

Fontaine v. Brown County Motors Co., 251 Wis. 433, 29 (N.W.2d 744 91937); In re Timmis, 200 N.Y. 177, 93 N.E. 522 (1910).

In particular, the courts have held that any sale, no matter how large, by a corporation formed for the purpose of selling a certain group of assets and then liquidating, is in the corporation's ordinary course of business and thus is not subject to shareholder consent statutes. See, e.g. Jeppi v. Brockman Holding Co., 34 Cal.2d 11, 1206 P.2d 847 (1949);[4] In re Miglietta, 287 N.Y. 246, 39 N.E.2d 224 (1942); Continental Bank & Trust Co. v. W.A.R. Realty Corp., 270 App.Div. 577, 61 N.Y.S.2d 273, aff'd mem, & appeal denied mem., 295 N.Y. 877, 884, 67 N.E.wd 517, 519 (19460; Thayer v. Valley Bank, 35 Ariz. 238

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[4] The parties agreed at oral argument that the courts of Hawaii frequently look to decisions from California when deciding cases of first impression.

276 P.526 (1929); 9 A.L.R.2d at 1315-16; 19 Am.Jur.2d supra, Sec. 1531. The rationale is that the corporation was formed for the very purpose and objective of selling all its assets; a sale of all the corporation's assets, far from hindering such a corporation, completely fulfills its goals. Thus, application of a shareholder consent statute to such a sale would frustrate, rather than further, the purposes of the statute. It is instructive to note that the corporations in Miglietta and Continental Bank, like appellee corporation, were formed for the purpose of disposing real property, and that most of the assets of the corporation in Jeppi were also real property. Furthermore, the corporation in Continental Bank, like appellee corporation, was formed for the purpose of trying to recover at least some money for creditors of an insolvent entity.

III. CONCLUSIONS

The exception that has been created to what would facially appear to be the absolute rule of the shareholder consent statutes constitutes a rational and consistent effort to implement the statutory provisions in light of their purpose and history, and clearly represents the prevailing rule in American jurisprudence. Thus, we believe that the courts of Hawaii would adopt the exception discussed above.[5] Accordingly, since appellee corporation was formed for the

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[5] The courts of Hawaii may never have to actually decide this question because effective July 1, 1986, Sec. 46-33 is repealed and replaced by Sec. 416-78 which clearly recognizes an exception for sales in the ordinary course of the corporation's business. See 1983 Hawaii Sess. Laws Act 167. Both parties have invited us to draw conclusions as to the meaning of Sec 416-33 from the enactment of Act 167 and its accompanying legislative history. Because of the terseness of the legislative history, however, we find it inconclusive.

purpose of selling its only asset, a parcel of real estate, consent of its shareholders under section 416-33 was not required; the district court erred in granting summary judgment in favor of appellee in the suit for declaratory relief, and in dismissing the action for specific performance and damages.[6] Therefore, we reverse and remand to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED

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[6] Thus, we need not reach the issue of whether appellee corporation in fact complied with the requirements of Sec. 416.33.

STATUTES, RULES AND LEGISLATIVE HISTORY

HAWAII REVISED STATUTES:

Sec.416-33 Voluntary transfer of corporate assets; notice to stockholders. A voluntary sale, lease, or exchange of all or substantially all of the property and assets of any domestic corporation, including its good will, may be authorized by it upon such terms and conditions and for such consideration (which may be in whole or in part shares of stock in or other securities of, any other corpration or corporations, domestic or foreign) as its board of directors deems expedient, and for the best interests of the corporation, when and as authorized or approved by the affirmative vote or consent of the holders of not less than three-fourths of all stock issued and outstanding and having voting power, or if it be a nonstock corporation, the affirmative vote or consent of three-fourths of its members. The authorization

or approval of the stockholders may be given before or after the adoption of the resolution by the board of directors. The articles of association or charter may require the authorization or approval of a larger proportion of the stockholders or members or the separate authorization and approval of three-fourths or a larger proportion of any class or classes of stockholders, and in that case the authorization or approval of the larger number of stockholders or members shall be required as provided in the articles of association or charter.

Approval of public officers required when. If the corporation is a fiduciary company within the meaning of section 402-1, or subject to the examination or investigation of the bank examiner under section 401-3, the action shall require the prior approval of the bank examiner, to be

evidenced by his certificate of approval filed with the corporation. If the corporation is a public utility company within the meaning of chapter 269, the action shall require the prior approval of the public utilities commission, to be evidenced by a certificate of approval filed with the corporation.

Notice of the meeting of stockholders or members called for the purpose of giving the authorization or approval shall be mailed to all of the stockholders or members of record of the corporation on the date of the call, whether or not they are entitled to vote thereat.

Enforcement; scope of application. No action or suit to set aside a sale, lease, or exchange by a corporation on the ground that this section has not been complied with, or upon any other ground, shall be brought more than ninety days after the recording of the instrument effecting the

sale, lease, or exchange in the bureau of conveyances. Nothing in this section shall be deemed to require the aprpoval of the stockholders except as may be required by the articles of association or bylaws to enable a corporation to make a mortgage, pledge, assignment, or transfer of all or any part of its assets as security for any obligation or liablity of any kind or nature or to make a transfer to satisfy or partially satisfy any obligation or liability; nor shall it be construed as modifying or amending any of the provisions of the Uniform Commercial Code, chapter 490, article 6, relating to bulk transfers.

Sec.602-5 Jurisdiction and powers. The supreme court shall have jurisdiction and powers as follows:

. . .

(2) To answer, in its discretion, any

question of law reserved by a circuit court, the land court, or the tax appeal court, or any question or proposition of law certified to it by a federal appellate court if the supreme court shall so provide by rule;

. . .

HAWAII RULES OF APPELLATE PROCEDURE:

Rule 13. CERTIFICATION OF QUESTION OF HAWAII LAW BY FEDERAL APPELLATE COURTS.

(a) When Certified. When a federal appellate court certifies to the Hawaii Supreme Court that there is involved in and proceeding before it a question concerning the law of Hawaii which is determinative of the cause, and that there is no clear controlling precedent in the Hawaii judicial decisions, the Hawaii Supreme Court may answer the certified question by written opinion.

(b) Contents of Certificate. The certificate provided for herein shall contain the title of the Hawaii Supreme Court and the title of the cause in full, and to the right thereof the words "Certified Question" and the name of the court submitting or approving the submission of the question. The certificate shall also contain a statement

of prior proceedings in the case, a statement of facts showing the nature of the cause, the question of law to be answered, and the circumstances out of which the question arises.

(c) Preparation of Certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared, and signed by the presiding judge of such federal court, it shall be certified to the Hawaii Surpeme Court by the clerk of the federal court and under its official seal. The Hawaii Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with the certificate.

(d) Briefs. Briefs conforming to the Hawaii Rules of Appellate Procedure shall be filed by the parties within the times provided by these rules as if the

certificate was a notice of appeal under these rules.

(e) Oral Argument. Unless otherwise ordered by the Hawaii Supreme Court, oral arugments conforming to its rules will be allowed.*

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*Large portions of the former Rules of the Surpeme Court were deleted and superseded by the Order Adopting Hawaii Rules of Appellate Procedure and Superseding Certain Other Rules filed April 16, 1984, effective June 1, 1984.

. . .

Senators Cobb, Chang, Uwaine and Soares
Managers on the part of the Senate

Representatives Shito, Lardizabal,
Taniguichi, Tungpalan, Graulty and Ikeda
Managers on the part of the House

Conf. Com. Rep. No. 12 on S.B. No. 55

The purpose of this bill is to replace existing state statutes which regulate the operation of profit corporations with an amended version of the Model Bsuiness Corporation Act ("Model Act").

Your Committee notes that various provision of the Model Act have in the past been used as a basis for the revision of certain provisions of Hawaii corporation law. Your Committee also notes that over twenty states have adopted the basic form and substance of the Model Act.

This bill amends present Hawaii law extensively in numerous areas and adds

provisions in areas where present law is silent. Other drafts of this bill have conformed various provisions of the Model Act to Hawaii Law. Additionally, other provisions have been added in Section -54 and Section -125 which require certain additional information of incorporators, directors, officers and stock subscribers of corporations, both in initial documentation and in annual statements filed with the Department of Commerce and Consumer Affairs.

Your Committee finds that the enactment of this bill will provide corporations and corporate practitioners with the advantage of the drafters' comments and stated intent, and an established body of judicial interpretation collected from jurisdictions that have adopted the Model Act. In those areas where existing Hawaii law is incorporated into the bill, existing Hawaii case law will continue as a basis for

interpretation.

Your Committee has amended the bill by deleting provisions in the bill relating to permissive increases in share voting requirements beyond a simple majority for the approval of certain corporate actions in Sections -59(c), -73(a)< -79(c) and -84(c). Your Committee finds that the provisions of Section -143 adequately address this discretionary right of share holders.

Your Committee has also made techincal corrections to the bill.

A summary of the major substantive provisions of this bill and its relation to current Hawaii Law is as follows:

New Provisions in Model Act:

. . .

Model Act Section	Hawaii Law Section	Change
-77	417-16,	Model Act requires vote of three-fourths of shares of

		domestic corporation with a foreign corporation; current law requires three-fourths of all issued and outstanding shares to approve; Model Act does not have special treatment for fiduciary companies, utilities and financial institutions.
-78	416-33	Model Act differentiates between sale or disposition of assets in the regular course of business and not in the regular course of business.
-79	416-33	Minimum notice must be given to shareholders prior to sale; shareholder approval requirement for such sales is a majority for corporations incorporated after July 1, 1986 in contrast to the present three-fourths requirement; miscellaneous provisions.
-80	417-19	Shareholders may, in addition to mergers, dissent to consoli-

		dations, share exchanges, and sales of assets not made in the regular course of business under the Model Act; shareholders may not dissent as to less than all shares held.
-81	417-19, 417-20	Dissenting shareholders required to file written objections prior to the proposed action and a separate demand for the shares' fair value (contrasted with fair market value in existing law) after the approval of the action; existing law only requires one written demand; depreciation and appreciation resulting from anticipated action is not considered in fair value; time restrictions for notification by the dissenting shareholder are amended.
-81	417-22	Model Act requires the surviving corporation to offer to purchase the dissenting shares; cur-

		rent law requires the constituent corporation to satisfy dissenter; time limits are imposed on the corporation to purchase dissenting shares after agreement.
-81	417-23	In cases where the corporation and dissenting shareholder cannot agree on the value of shares, burden of bringing action in court shifted from shareholder to corporation.

(2)

Supreme Court, U.S.
FILED
MAR 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1383

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

KAONOHI OHANA, LTD.

Petitioner,

vs.

NANCY E. SUTHERLAND, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1983 Hawaii Session Laws, Act. 167,
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STATEMENT OF THE CASE

Petitioner, Kaonohi Ohana, Ltd. (hereinafter "Kaonohi") entered into a contract with Respondent, Nancy E. Sutherland, in which Kaonohi agreed to sell 5.36 acres of vacant fee simple beach front property on the Hawaiian Island of Kauai, to Sutherland.[1] Sutherland's offer was "contingent upon seller obtaining such approval as is required by its Articles of Incorporation and By-Laws and the statutes of the State of Hawaii to convey title to the subject property."

Kaonohi was an Hawaii Corporation formed pursuant to a plan of reorganization in the Bankruptcy Court for the Northern District of California. The sole asset of Kaonohi was the Kauai land which was to be sold either before or after development to pay unsecured creditors of the bankrupt, Dr. Alex Ferreira. Under the plan, the creditors and

[1]Respondents, Donald Sutherland and Stephen Newnham, Trustees of the Ralph L. Evans Trust, were intended assignees of the contract from Sutherland.

Ferreira were to be stockholders of Kaonohi. After the property was sold, Kaonohi was to be liquidated and distribution made to the stockholders under a formula depending on the class of stock held.

All negotiations and the final acceptance of the Sutherland offer "on behalf of the board of directors" of Kaonohi was handled by lawyer Boyce Brown. Brown was a creditor of Ferreira, and an officer, director, and sole stockholder of record of Kaonohi. He held the stock as trustee for the unsecured creditors and Ferreira. Brown and his law firm formed the corporation in Hawaii.

The basic issue in this case was the applicability of Hawaii corporate law, Section 416-33 Hawaii Revised Statutes[2] to

[2]Section 416-33 provides in part: "A voluntary sale ... of all or substantially all of the property and assets of any domestic corporation ... may be authorized by it ... when and as authorized or approved by the affirmative vote or consent of the holders of not less than three-fourths of all stock issued and outstanding and having voting power.

the transaction. A subsidiary issue not reached by the Court of Appeals was whether Brown, the sole stockholder of record as trustee for numerous un-named individuals, by accepting the offer "on behalf of the board of directors" could thereafter invalidate the contract because the stockholder approval required by Section 416-33 had not been obtained. After entering into the contract with Sutherland, Kaonohi received a better offer from actor Sylvestor Stallone. Kaonohi accepted the Stallone offer and repudiated its contract with Sutherland.

Respondents thereupon filed suit in the United States District Court for the District of Hawaii for specific performance (Civil No. 84-0692). On the same day Kaonohi filed suit against Sutherland in the Circuit Court of the Fifth Circuit, State of Hawaii on the island of Kauai asking for a declaratory judgment that Section 416-33 voided the contract. Sutherland removed the

declaratory judgment action from the state court to the United States District Court (Civil No. 84-0748) and the two cases were consolidated for an expedited hearing on cross motions for summary judgment and Kaonohi's motion to dismiss.

The District Court granted summary judgment in favor of Kaonohi on the declaratory judgment action and dismissed the suit for specific performance, holding as a matter of law that Section 416-33 applied to the transaction, that any "normal course of business exception" to Section 416-33 did not apply and that the necessary stockholder approval of the transaction had not been obtained.

The United States Court of Appeals for the Ninth Circuit reversed holding that the "ordinary course of business exception" applied to Section 416-33 and the statute did not apply to the transaction in this case. Therefore, no stockholder approval was

required to validate the contract of sale entered into between Kaonohi and Sutherland.

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD NOT CONSIDER THE QUESTION OF WHETHER SPECIAL WEIGHT IS TO BE GIVEN A DISTRICT COURT'S DECISION ON STATE LAW WHERE PETITIONER AT NO TIME REQUESTED THE COURT OF APPEALS TO GIVE SPECIAL WEIGHT TO THE DISTRICT COURT'S RULING.

The legal issue before the District Court and the Court of Appeals was the existence and application of the "ordinary course of business" exception to Section 416-33 which requires the approval of the holders of three-fourths of the stock to sell all the assets of a corporation. This issue has never been decided by any court in Hawaii in a reported decision. The District Court assuming that such an exception existed found it not applicable:

> "Assuming that Hawaii courts would follow the `normal course of business' exception, it is the determination of this Court that the sale of the property in this case does not fall within that exception and therefore is subject to

> the shareholder approval requirement of the statute." Petitioner's Appendix (hereinafter "App.") p. A6.

The Court of Appeals in its per curiam decision reversed:

> "The exception that has been created to what would facially appear to be the absolute rule of the shareholder consent statutes constitutes a rational and consistent effort to implement the statutory provisions in light of their purpose and history, and clearly represents the prevailing rule in American jurisprudence. Thus, we believe that the courts of Hawaii would adopt the exception discussed above. Accordingly, since appellee corporation was formed for the purpose of selling its only asset, a parcel of real estate, consent of its shareholders under Section 416-33 was not required;". 776 F.2d 1427, App. pp. A19-A20.

Petitioner alleges as error the Court of Appeals' view that "The district court's interpretation of Hawaii law is . . . reviewed de novo." 776 F.2d 1426, App. p. A13. Petitioner now argues that the Court of Appeals did not give enough weight to the District Court's decision on a state law issue of first impression. Although Petitioner complains that the Court of

Appeals' review of the district court's decision was de novo, Petitioner in its opening brief argued for this very standard:

> "To the extent that this Court is called upon only to review the motions for summary judgment, the standard of review is a de novo review. That standard normally applies to a review of appeals from orders granting or denying of motions for summary judgment. International Ladies Garment Workers Union AFLCIO v. Surech, 681 F.2d, 624 (9th Cir., 1981). In a de novo review, the appellate court looks at the findings and conclusions reached by the lower court and makes it's own independent determination as to whether the court erred in (1) finding no material facts were in dispute and/or (2) holding the movant was entitled to a judgment as a matter of law." Appellee's Answering Brief, p. 11.

The Court of Appeals adopted the "ordinary course of business" exception to Section 416-33 citing the California case of Jeppi v. Brockman Holding Co., 34 Cal.2d 11, 206 P.2d 847 (1949) and cases from other jurisdictions. 776 F.2d 1427, App. pp. A17-A18. In citing the Jeppi case, the Court noted:

> "The parties agreed at oral argument that the courts of Hawaii frequently look to decisions from California when deciding cases of first impression." 776 F.2d 1427, n. 4, App. p. A17.

The agreement by Petitioner that the courts of Hawaii frequently look to California decisions as persuasive authority when deciding cases of first impression at the very least advised the Court of Appeals that it could rely on the reasoning of Jeppi v. Brockman Holding Co. as authority for adopting the "ordinary course of business" exception to Section 416-33.

To grant the Petition for Certiorari under these circumstances would violate the rule that courts will not be reversed when they are led into error. Petitioner, after advising the Court of Appeals to review the granting of summary judgment de novo and agreeing that the Hawaii courts often look to California decisions in cases of first impression, now claims that the Court of Appeals committed error by reviewing the state law issue de novo and holding that the

Hawaii courts would follow the California rule which is also the "prevailing rule in American Jurisprudence". 776 F.2d 1427, App. pp. A17-A18.

Petitioner never even called this alleged error to the Court's attention by way of a petition for re-hearing. Therefore, the Petition for Certiorari should be denied. As this Court pointed out in Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970):

> "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them. Lawn v. United States, 355 U.S. 339, 362-363, n. 16 (1958); Husty v. United States, 282 U.S. 694, 701-702 (1931); Duignan v. United States, 274 U.S. 195, 200 (1927)."

It should also be noted that the District Court assumed that a "normal business exception" would be adopted by the courts of Hawaii. The court merely refused to apply the exception in the case of a corporation formed as a result of a bankruptcy reorganization to take title to and sell unimproved property the proceeds of

which were to be paid to unsecured creditors and the bankrupt. The District Court reasoned:

> None of the cases cited by Sutherland in support of her argument that section 416-33 is inapplicable involved the type of situation presented here. Kaonohi Ohana was formed for the purpose of selling the property in order to pay off Ferreira's creditors and, apparently, Ferreira himself. Clearly all the claimants have an important stake in the sale of the property, the corporation's only asset, since the satisfaction of their claims depends on the terms of the sale. Accordingly, it would seem imperative that their consent be obtained. App. pp. A6-A7.

The cases cited by Sutherland that the District Court found inapplicable were the same cases the Court of Appeals relied on to adopt and apply the "ordinary course of business" exception to section 416-33. These cases were not Hawaii cases because none exist. The applicability of the rule of law expounded in these cases to the undisputed facts of the case at bar was not an issue that needed special expertise in Hawaiian Law

to decide. Certainly the judges of the Court of Appeals are as well qualified as the District Court in analyzing decisions from other states and applying the reasoning of those cases to the undisputed facts of this case.

The District Court apparently found those cases not applicable because of the plan of reorganization in bankrutcy from the Northern District of California. The legal effect of a plan of reorganization from a bankruptcy court in California is not an issue that a judge in Hawaii is better qualified to decide than the Court of Appeals.

Even if this court believes that the question of the weight to be given a state law decision by a district judge is an issue this court should consider, this is not an appropriate case in which to decide the matter. The District Court's decision was not based on Hawaii law but the applicability of out of state decisions to a sale by a

corporation organized pursuant to a bankruptcy reorganization. The Court of Appeals properly decided the question de novo.

II. PETITIONER MADE NO REQUEST TO THE COURT OF APPEALS TO CERTIFY THE ISSUE OF STATE LAW TO THE SUPREME COURT OF HAWAII, AND PETITIONER SHOULD NOT NOW MAKE SUCH A REQUEST AFTER LOSING IN THE COURT OF APPEALS.

After losing the case on appeal in the Court of Appeals, Petitioner for the first time claims that the interpretation of Section 416-33 and its applicability to the facts herein should have been certified to the Supreme Court of Hawaii. Again, the failure to make such a request before the court had ruled against Petitioner is a fatal defect in the Petition. The Court should not consider the certification issue because it was not raised in the Court of Appeals.

In any event, this Court has stated:

> "Where the certification process is available, resort to it is not obligatory." Lehman Brothers v. Schein, 416 U.S. 386, 390-391 (1974).

As pointed out in the concurring opinion in Lehman Brothers, certification may be expensive and will delay the eventual decision of the case. 416 U.S. 394-395. In any event, this is not an appropriate case for certification.

There is little chance that future litigants will require a definitive opinion as to the existence and application of the "ordinary course of business" exception to Section 416-33. In the close to half century since Section 416-33 was adopted, the matter has not been decided by the Supreme Court of Hawaii and the section will be superceded by the Model Business Act which explicitly adopts the "ordinary course of business" exception. 1983 Hawaii Session Laws, Act. 167, sec. 78.[3]

[3]Sale of assets in regular course of business and mortgagor pledge of assets. The sale, lease, exchange, or other disposition of all, or substantially all, the property and assets of a corporation in the usual and regular course of its business and the mortgage or pledge of any or all property and assets of a corporation whether or not in the usual

III. THERE IS NO NEED FOR FURTHER CONSIDERATION OF THE LEGAL ISSUE HEREIN.

Petitioner's final argument is that the Court of Appeals was wrong in its interpretation of state law. It argues "Section 416-33 HRS is plain and unambiguous and the district court properly interpreted it according to its plain, specific terms." Br. 40. Petitioner maintains that the Hawaii courts would not adopt the "ordinary course of business" exception to Section 416-33, but that is contrary to the assumption of the District Court and the holding of the Court of Appeals.

This Court need not decide questions of state law already considered by the District

footnote cont'd./ and regular course of business may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of cash or other property, including shares, obligations, or other securities of any other corporation, domestic or foreign, as shall be authorized by its board of directors; and in any such case no authorization or consent of the shareholders shall be required.

Court and the Court of Appeals. Butner v. United States, 440 U.S. 48, (1979); Runyon v. McCrary, 427 U.S. 160, 181-182 (1976); In Re McLinn, 739 F.2d 1395, 1398-99 (9th Cir. 1984).

The fact that the Hawaii Legislature adopted the "ordinary course of business" exception in the Model Business Act, 1983 Session Laws, Act 167, sec. 78, cannot be considered evidence that the prevailing American rule of jurisprudence implying an "ordinary course of business" exception to Section 416-33 would not be adopted by the courts of Hawaii if the matter came before them. As the Court of Appeals explains:

> "The statutes, including Hawaii's, were enacted for the purpose of abrogating the common-law rule which required unanimous consent of the shareholders. However, the common law rule itself had an exception for sales in the ordinary course of the corporation's business, and the courts have continued to apply that exception to the statutory provisions on the theory that the statutes were intended to abrogate only the uanimity rule, not the exception." 776 F.2d 1427, App. p. A16.

Petitioner contends "In Hawaii, statutes in derogation of the common law are strictly construed." Br. 56. The common law rule is that the "ordinary course of business" exception applies. Adopting the "ordinary course of business" exception to Section 416-33 complies with the rule of statutory construction in conformity with the common law argued for by Petitioner.

The Court of Appeals applied the "ordinary course of business" exception to Section 416-33 to the undisputed facts of this case. The District Court assumed that such an exception would apply in an appropriate case. There is no need for further review as to whether such an exception exists under Hawaii law.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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Counsel of Record for
Respondents, Nancy E. Sutherland, et al.

Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
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(3)

NO. 85-1383

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

KAONOHI OHANA, LTD.

Petitioner,

vs.

NANCY E. SUTHERLAND, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Sec. 416-33 4

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

I. FACTUAL CLARIFICATIONS

Respondents, at page 4 of their Brief In Opposition To Petition for Writ of Certiorari, inaccurately assume that a contract for sale of the 5.36 acres of vacant fee simple beachfront property on

the Island of Kauai became binding between Petitioner Kaonohi Ohana, Ltd. and Respondent. Thus, Respondents mistakenly conclude that Kaonohi Ohana repudiated its contract with Respondents when it accepted the actor Sylvester Stallone's offer to purchase the property. This inaccurate assumption must be corrected. As stated in the ruling which should have been accorded special consideration by the appellate court, the United States District Court for the District of Hawaii declared in its Decision and Order:

> After further negotiations, Brown accepted Sutherland's offer <u>on behalf of the board of directors</u>. The parties agreed that shareholder approval of the sale, if required, would have to be obtained by June 29, 1984, the closing date.

> Several weeks before the closing date, Kaonohi Ohana received an offer from Sylvester Stallone to purchase the property for $1.75 million. Kaonohi Ohana accepted that offer subject to the rights, if any, of Sutherland.

Appendix A-3 to Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (Emphasis added). As the Court further noted:

> Kaonohi Ohana was formed for the purpose of selling the property in order to pay off Ferreira's creditors and, apparently, Ferreira himself. Clearly all of the claimants have an important stake in the sale of the property, the corporation's only asset, since the satisfaction of their claims depends on the terms of the sale. Accordingly, it would seem imperative that their consent be obtained.

Appendix A-6 to A-7. While the opinion of the United States Court of Appeals for the 9th Circuit, 776 F.2d 1425 (9th Cir. 1985)(Appendix A-9 to A-20), which necessitated this Petition, determined consent of shareholders was not required, the appellate court did "...not reach the issue of whether [Kaonohi] corporation in fact complied with the requirements of Sec. 416-33 [governing authorization or approval of the sale]. Sutherland v. Kaonohi Ohana, Ltd., 776 F.2d 1428, n.6, (Appendix A-20). Thus, it has not been judically determined that a contract came into existence between Kaonohi Ohana and Respondent.

II. RESPONDENT INCORRECTLY ASSUMES THAT KAONOHI SHOULD HAVE "REQUESTED" THE APPELLATE COURT TO GIVE SPECIAL CONSIDERATION TO THE DISTRICT COURT'S INTERPRETATION OF STATE LAW.

All circuits except the Ninth Cir uit give special consideration, great weight, great deference or substantial deference to the local district court's interpretation of state law. See, Dissent In and Appendix to Matter of McLinn, 739 F.2d 1395, 1403-1412 (9th Cir. 1984)(en banc).[1] As Respondents correctly noted, Kaonohi Ohana stated the standard of review in the appellate court was a de novo review of orders granting or denying motions for summary judgment. What

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[1] The Ninth Circuit announced its abrupt departure from the other circuits in McLinn, supra.

misunderstands is, in exercising this de novo review, all circuits except the Ninth Circuit give "great weight" or "deference" to the decision of the local federal courts not because they have been "requested", but as "a responsible exercise of appellate authority". McLinn, supra, 739 F.2d at 1406. In his vigorous dissent in McLinn, supra, Circuit Judge Schroeder, joined by dissenting Chief Judge Browning and Circuit Judges Anderson, Tang and Ferguson declared:

> Appellate courts exercise de novo review over all questions of law, whether state or federal. Appellate courts may, and as the cases demonstrate overwhelmingly, do substitute their judgements for the judgments of district courts on state as well as federal issues. By giving "substantial deference," or what I believe to be the better phrase, "great weight," to the decisions of the

> district courts, appellate courts do not suspend their own thought processes. They treat the expertise of the district judge in local law as a factor that requires a careful review of the district court's decision before the appellate court reaches a different conclusion. The circuits have not, as the majority would have us believe, been guilty of a massive "abdication" of responsibility.
>
> ...
>
> The special weight that should be given to a district court's decision is not intended to make our examination any less thorough or independent. It is intended to make us more careful. Its purpose is to prevent hasty and perhaps arbitrary decisions in areas of local law with which we may not be fully familiar. Giving special consideration to a district court's decision on a state law question is a responsibile exercise of appellate authority.

McLinn, supra, 739 F.2d at 1404, 1406. In other words, in their exercise

of their appellate jurisdiction, all circuits except the Ninth in their de novo review afford great weight or deference to the district courts' decisions on state law questions.[2]

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[2] As noted in the dissent, "[t]he most regrettable aspect of [McLinn] decision is the message it sends to the district courts and the litigants. It suggests to the district courts that time spent thoroughly explaining a state law question is time wasted; we therefore will be deprived of their expertise. At the same time, the majority signals to litigants that reversals will be easier to obtain, thus encouraging more appeals. The inevitable result is that we will be faced with more state law issues, but provided with less guidance. The majority offers this result without any attempt to demonstrate that the standard it now decries has led to unfairness or incorrect results. McLinn, supra, 739 F.2d at 1406.

CONCLUSION

Because of the Ninth Circuit's refusal to accord weight or deference to the decision of the Federal district court's interpretation of state law, this Court should rule upon the substantial, important and recurring questions presented in this Petition and thereby resolve the conflict between the Ninth and other circuits.

RESPECTFULLY SUBMITTED,

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